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No. 08-480

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALEXIS SICILIA,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Florida substantive law requires that handicap discrimination and retaliation claims under the Florida Civil Rights Act be construed in conformity with federal law, and the Eleventh Circuit did so. Did the Eleventh Circuit err in applying state substantive law – which requires conformity with federal law – in this diversity case?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent United Parcel Service, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

In this Petition, Alexis Sicilia (Sicilia) petitions the Court for review of the Eleventh Circuit's May 30, 2008 decision affirming the district court's grant of summary judgment in favor of United Parcel Service, Inc. (UPS) on Sicilia's handicap discrimination and retaliation claims under the Florida Civil Rights Act (FCRA).

Sicilia filed an action against UPS in Florida state court on November 7, 2006, claiming UPS had violated the FCRA by suspending him from full-time employment on account of his epilepsy. UPS removed the case to federal district court. After UPS terminated his employment, Sicilia amended his Complaint. In his amended two-count Complaint, Sicilia claimed UPS (1) discriminated against him, by suspending and terminating his employment, because he is epileptic and (2) retaliated against him, by suspending and terminating his employment, because he filed this action. UPS moved for summary judgment, and on October 5, 2007, the district court granted summary judgment to UPS on both the discrimination and retaliation claims.

In granting summary judgment in favor of UPS, the district court recognized that Florida substantive law applied. App. 23 n.3 ("The case is before this Court on diversity grounds; therefore, Florida substantive law applies to Plaintiffs' [sic] claims."). The court noted that, under Florida law, disability discrimination claims under the FCRA are analyzed

under the same framework as disability claims brought under the federal Americans with Disabilities Act (ADA). Accordingly, the court addressed whether Sicilia had established a prima facie case of disability discrimination under the ADA.

The court found that Sicilia was not "disabled" under the ADA and, therefore, not "handicapped" under the FCRA; that even if Sicilia were handicapped, UPS extended reasonable accommodations to him by notifying him of available positions for which he could apply; and that Sicilia did not submit any evidence that UPS acted with discriminatory intent in suspending or terminating his employment. The court therefore concluded that Sicilia failed to establish a prima facie case of discrimination and, even if Sicilia had established a prima facie case, UPS offered legitimate, non-discriminatory reasons for its decisions to suspend and terminate Sicilia's employment.

The district court also concluded that Sicilia failed to establish a prima facie case of retaliation against UPS. Following Florida substantive law requirements, the court relied on Title VII case law in analyzing Sicilia's retaliation claim. App. 34 n.6 ("Since Florida has modeled the FCRA after Title VII, Florida courts apply Title VII case law to claims of unlawful retaliation brought under the FCRA."). The court found that Sicilia failed to show a causal connection between the filing of his administrative and judicial complaints and the suspension and ultimate

termination of his employment. The court entered summary judgment for UPS on both counts.

On appeal, Sicilia claimed the district court erred in determining Sicilia was not "handicapped." Specifically, Sicilia claimed that § 385.207, Florida Statutes, conclusively establishes that Sicilia is "handicapped" for purposes of the FCRA and the district court erred in failing to read § 385.207 *in para materia* with the FCRA. Sicilia also argued on appeal that there were genuine issues of fact concerning whether UPS extended "reasonable accommodations" to him and whether UPS's termination was in retaliation for his filing an action against it.

The Eleventh Circuit affirmed the district court's grant of summary judgment in favor of UPS. The court expressly rejected Sicilia's argument that, by virtue of § 385.207(1), Sicilia was "handicapped" as a matter of law for purposes of the FCRA. In rejecting Sicilia's argument, the court observed that the statute applies to the Department of Health, is not a civil rights statute, and need not be read in conjunction with the FCRA. The Court also recognized that, under Florida law, claims raised under the FCRA must be analyzed under the same framework as the federal ADA. App. 4 ("Disability discrimination claims raised under the FCRA are analyzed under the same framework as the Americans with Disabilities Act (ADA).")

As required by Florida law, the Eleventh Circuit relied on ADA case law and found that Sicilia was not

handicapped because his epilepsy did not substantially limit him in a major life activity. The court further found that UPS was not required to accommodate Sicilia because he did not qualify as "disabled" and, even if Sicilia did qualify for an accommodation, UPS was not required to violate its seniority system to select him for the full-time, daytime position for which he applied. Finally, applying the federal Title VII framework to Sicilia's retaliation claim (as required by state substantive law), the court determined that Sicilia had not shown a causal link between his suspension and termination and the filing of his complaint. App. 7 n.6 ("Retaliation claims under the FCRA's anti-retaliation provision, section 760.10(1), are analyzed under the same framework of Title VII.")

The court affirmed summary judgment on both claims. Sicilia now petitions the Court for certiorari review.

REASONS FOR DENYING THE PETITION

Sicilia has presented no compelling reasons for this Court to grant his Petition for Writ of Certiorari. *See* SUP. CT. R. 10. Sicilia claims incorrectly that the Eleventh Circuit's May 30, 2008 opinion is a "direct challenge" to the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). According to Sicilia, the Eleventh Circuit engaged in an "unauthorized federalization" of the Florida Civil Rights Act (FCRA) by interpreting the pertinent provisions of the FCRA in conformity with the federal Americans with Disabilities Act (ADA). Sicilia further claims, incorrectly, that the Eleventh Circuit "abrogated" § 385.207(1), Florida Statutes, and the court should have, "at a minimum," accepted his suggestion to certify the issue to the Florida Supreme Court.[1]

Under *Erie*, federal courts must apply state substantive law to state-law claims in a diversity action. 304 U.S. at 78-79. Contrary to Sicilia's suggestion, the Eleventh Circuit did precisely that. In reviewing the district court's grant of summary judgment on the handicap discrimination and retaliation claims

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[1] Below, Sicilia did not argue that the court's reliance on ADA or Title VII case law in addressing his claims under the FCRA would constitute a "direct challenge" to *Erie* or a "federalization" of state law, as he now claims in his Petition for Writ of Certiorari. Sicilia simply argued that, with respect to his handicap discrimination claim, § 385.207(1), Florida Statutes, should be read *in para materia* with the FCRA.

under the FCRA, the Eleventh Circuit applied Florida substantive law.

It is well-settled under Florida law that Florida courts must construe handicap discrimination claims under the FCRA in conformity with the federal ADA. *Byrd v. BT Foods, Inc.*, 948 So. 2d 921, 925 (Fla. Dist. Ct. App. 2007) ("As applied to discrimination based on a handicap, the FCRA is construed in conformity with the federal Americans with Disabilities Act (ADA).") Other Florida courts addressing the issue have ruled similarly. *See, e.g., Lenard v. A.L.P.H.A. "A Beginning" Inc.*, 945 So. 2d 618, 621 (Fla. Dist. Ct. App. 2006); *Wimberly v. Sec. Tech. Group, Inc.*, 866 So. 2d 146, 147 (Fla. Dist. Ct. App. 2004); *Ross v. Jim Adams Ford, Inc.*, 871 So. 2d 312, 314 (Fla. Dist. Ct. App. 2004); *Razner v. Wellington Reg'l Med. Ctr., Inc.*, 837 So. 2d 437, 440 (Fla. Dist. Ct. App. 2002); *Tourville v. Securex, Inc.*, 769 So. 2d 491, 492 n.1 (Fla. Dist. Ct. App. 2000); *McCaw Cellular Commc'ns of Fla., Inc. v. Kwiatek*, 763 So. 2d 1063, 1065 (Fla. Dist. Ct. App. 1999); *Smith v. Avatar Props., Inc.*, 714 So. 2d 1103, 1106 (Fla. Dist. Ct. App. 1998); *Greene v. Seminole Elec. Coop., Inc.*, 701 So. 2d 646, 647 (Fla. Dist. Ct. App. 1997).[2] By relying on federal ADA case

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[2] Further confirmation that Florida law relies on its federal counterpart for claims under the FCRA is found in another civil rights statute in the same antidiscrimination chapter as the FCRA, namely, § 760.22(7), Florida Statutes. Section 760.22(7) defines the term "handicap" for purposes of the Fair Housing Act, a companion legislation to the FCRA that, like the FCRA, is administered by the Florida Commission on Human Relations.

(Continued on following page)

law to determine whether Sicilia's claims under the FCRA could withstand summary judgment, the Eleventh Circuit simply abided by the mandates of Florida substantive law. Thus, to suggest that by *following* Florida law, the Eleventh Circuit "federalized" the FCRA and challenged *Erie* is wrong. While Florida courts may have themselves "federalized" the FCRA by incorporating federal case law into state substantive-law standards, the Eleventh Circuit did no more than what state law requires.[3]

In fact, the Eleventh Circuit is not the only Circuit that has relied on ADA case law when analyzing state discrimination claims. At least two other Circuits, the Sixth and the Eighth, have likewise

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See FLA. STAT. §§ 760.02, 760.22. Notably, the definition of the term "handicap" in § 760.22(7)(a) is almost identical to the definition under the ADA.

[3] Similarly, Florida courts apply Title VII case law to claims of unlawful retaliation brought under the FCRA. *See Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387, 1389 (11th Cir. 1998) ("The Florida courts have held that decisions construing Title VII are applicable when considering claims under the Florida Civil Rights Act, because the Florida act was patterned after Title VII. *See Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005, 1009 (Fla. 1989); *Fla. State Univ. v. Sondel*, 685 So. 2d 923, 925 n.1 (Fla. Dist. Ct. App. 1996); *Gray v. Russell Corp.*, 681 So.2d 310, 312 (Fla. Dist. Ct. App. 1996) . . . No Florida court has interpreted the Florida statute to impose substantive liability where Title VII does not."); *see also Donovan v. Broward County Bd. of Comm'rs*, 974 So. 2d 458, 459 (Fla. Dist. Ct. App. 2008) (confirming that the retaliation provision of the FCRA is "virtually identical to its federal counterpart, Title VII").

relied on federal case law in addressing *state* discrimination claims when state law directs them to do so. And, in so doing, those Circuits have at least implicitly recognized that such reliance on federal case law comports with *Erie*. *Brocklehurst v. PPG Indus., Inc.*, 123 F.3d 890, 894 (6th Cir. 1997) ("In a diversity action such as this, a federal court applies state substantive law to state-law claims. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Because [the plaintiff] filed this age discrimination claim pursuant to Michigan's [statute], Michigan substantive law governs this action. *We note, however, that the Michigan courts look to federal law when reviewing claims of age discrimination under [the Michigan statute].*" (emphasis added)); *Tart v. Hill Behan Lumber Co.*, 31 F.3d 668, 671 (8th Cir. 1994) ("In a diversity action, we look to state law to assess the substantive correctness of the jury instructions. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938). . . . Decisions under the [Missouri statute], however, are guided not only by Missouri law *but also by federal employment discrimination decisions* which 'are applicable and authoritative under [the Missouri statute].'" (emphasis added)).

Sicilia also suggests that the Eleventh Circuit's decision "abrogated" § 385.207(1), Florida Statutes. No Florida court, let alone the Florida Supreme Court, has ever ruled that § 385.207(1) must be considered when addressing a claim under the FCRA. Moreover, no Florida court has ever ruled that

§ 385.207(1) is even relevant to a claim under the FCRA. As the Eleventh Circuit explained, § 385.207(1) applies to the Department of Health, is unrelated to civil rights and the FCRA, and need not be read in conjunction with the FCRA. Accordingly, the Eleventh Circuit did not abrogate § 385.207(1). It simply did not consider it because it is neither applicable nor relevant.[4]

Lastly, Sicilia claims the Eleventh Circuit should have, "at a minimum," certified his arguments to the Florida Supreme Court. Under Florida Rule of Appellate Procedure 9.150, a United States court of appeals "*may* certify a question of law to the Supreme Court of Florida if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida." FLA. R. APP. PROC. 9.150 (emphasis added). The Rule is clearly worded as permissive, and

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[4] Sicilia's suggestion that § 385.207(1) conclusively establishes that epilepsy is a "handicap" *for purposes of* the FCRA is wholly unfounded. In fact, if the Eleventh Circuit had considered § 385.207(1) in determining whether Sicilia was "handicapped" under the FCRA, such an analysis would have conflicted with the plethora of Florida cases mandating that (1) the FCRA must be construed in conformity with the ADA and (2) more specifically, whether an individual is "handicapped" under the FCRA depends on whether the individual is "disabled" under the ADA. Further, had the court deemed Sicilia's epilepsy a "handicap" solely by virtue of § 385.207(1), such a finding also would have conflicted with Florida law establishing that whether an individual is handicapped under the FCRA turns on the facts of each case and must be determined on an individualized basis. *See Byrd*, 948 So. 2d at 926.

the Eleventh Circuit did not deem it necessary, given the plethora of clear and consistent Florida case law, to certify any of the issues before it to the Florida Supreme Court. Certainly, the Eleventh Circuit's sound exercise of its discretion on this point cannot be a "compelling reason" justifying review on petition for writ of certiorari.[5]

Sicilia relies on one case to support his contention that the Eleventh Circuit should have certified the issue to the Florida Supreme Court. The case, however, is inapposite, and, what is more, supports UPS's position. In *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), originating from the Southern District of New York, this Court observed that resort to the certification procedure is particularly appropriate where a federal appellate court is presented with a novel question in an unsettled area of state law. *Id.* at 391. According to the Court, when federal judges attempt to predict "uncertain" state law, they act as "outsiders" and lack the "common exposure to local law which comes from sitting in the jurisdiction." *Id.* The Court remanded the judgment for the appellate court to consider whether the issue should be certified to the state supreme court. *Id.* at 391-02.

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[5] Eleventh Circuit case law on certification is consistent with the Florida Rule of Appellate Procedure. "This court *may* certify questions of state law to the state's highest court." *MCI WorldCom Network Servs. v. Mastec, Inc.*, 370 F.3d 1074, 1078 (11th Cir. 2004) (emphasis added); *SCI Liquidating Corp. v. Hartford Fire Ins. Co.*, 181 F.3d 1210, 1219 (11th Cir. 1999).

In the instant case, the Eleventh Circuit was not presented with a novel question. The Eleventh Circuit and Florida courts have addressed on countless occasions whether an employee is handicapped for purposes of the FCRA. Further, the analysis for such a determination has been repeatedly, and clearly, set forth by Florida courts: the FCRA must be construed in conformity with the ADA. *See* cases cited *supra*. Sicilia's "novel" argument asking the Eleventh Circuit to disregard settled law does not make the issue in the case a novel one. On the contrary, the Eleventh Circuit had more than sufficient guidance from Florida law on how to decide the issue. The settled Florida law on how to decide claims under the FCRA compelled the Eleventh Circuit to affirm the judgment against Sicilia.

CONCLUSION

Sicilia has failed to establish any compelling reasons for this Court to grant his Petition for Writ of Certiorari. Accordingly, it should be denied.

Respectfully submitted,

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